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4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**  
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7 **TOM GONZALES,**

8 **Plaintiff,**

9 **vs.**

10 **DESERT LAND, LLC et al.,**

11 **Defendants.**

2:15-cv-00915-RCJ-VPC

12 **TOM GONZALES,**

13 **Plaintiff,**

14 **vs.**

15 **SHOTGUN NEVADA INVESTMENTS,**  
16 **LLC et al.,**

17 **Defendants.**

2:13-cv-00931-RCJ-VPC

18 **ORDER**

19 This case is the third action in this Court by Plaintiff Tom Gonzales concerning his  
20 entitlement to a fee under a plan of confirmation the undersigned entered years ago while sitting  
21 as a bankruptcy judge. The Court has held a bench trial and ruled in favor of Plaintiff. Several  
22 motions are pending concerning Plaintiff's proposed form of judgment.

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1     **I.     PROCEDURAL HISTORY**

2             **A.     The Desert Land Bankruptcies**

3             On December 7, 2000, Plaintiff loaned \$41.5 million to Desert Land, LLC and Desert  
4     Oasis Apartments, LLC to finance their acquisition and development of land in Las Vegas,  
5     Nevada. The loan was secured by a deed of trust. On May 31, 2002, Desert Land, Desert Oasis  
6     Apartments, and Desert Ranch, LLC (collectively, “the Desert Entities”) filed for bankruptcy,  
7     and the undersigned jointly administered those bankruptcies while sitting as a bankruptcy judge.  
8     The bankruptcy court confirmed the Second Amended Plan of Reorganization (“the Plan”), and  
9     the resulting confirmation order (“the Confirmation Order”) included a finding that a settlement  
10    had been reached (“the Settlement Agreement,” which, along with the Plan, was attached to the  
11    Confirmation Order) under which Gonzales would extinguish his note and reconvey his deed of  
12    trust against Parcel A, Gonzales and another party would convey their interests in Parcel A to  
13    Desert Land and/or Desert Oasis Apartments so that those entities would own 100% of Parcel A,  
14    Gonzales would receive Desert Ranch’s 65% interest in another property, and Gonzales would  
15    receive \$7.5 million or \$10 million if Parcel A were sold or otherwise transferred, depending on  
16    the date of transfer (“the Parcel A Transfer Fee”). Gonzales appealed, and the Bankruptcy  
17    Appellate Panel affirmed except as to a provision subordinating Gonzales’s interest in the Parcel  
18    A Transfer Fee to up to \$45 million in financing. The Court of Appeals affirmed.

19             **B.     The First Action**

20             In 2011, Gonzales sued the Desert Entities, Specialty Trust, Specialty Strategic Financing  
21    Fund, LP, Eagle Mortgage Co., and Wells Fargo in state court for: (1) declaratory judgment that  
22    a transfer of Parcel A had occurred entitling him to the Parcel A Transfer Fee; (2) declaratory  
23    judgment that the lender defendants in that action knew of the bankruptcy proceedings and the  
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1 requirement of the Parcel A Transfer Fee; (3) breach of contract; (4) breach of the implied  
2 covenant of good faith and fair dealing; (5) judicial foreclosure against Parcel A; and (6)  
3 injunctive relief. The defendants removed the case to the bankruptcy court, which suggested  
4 withdrawal of the reference because the undersigned had issued the Confirmation Order while  
5 sitting as a bankruptcy judge. One or more parties so moved, and the Court granted the motion.  
6 In that case, No. 3:11-cv-613, the Court ruled that the Parcel A Transfer Fee had not been  
7 triggered based on the allegations made there, and that Gonzales had no lien against Parcel A.  
8 The Court of Appeals affirmed.

9 **C. The Second Action**

10 In the Second Action, No. 2:13-cv-931, also removed from state court, Gonzales alleged  
11 that Shotgun Investments Nevada, LLC had made various loans to the Desert Entities for the  
12 development of Parcel A in 2012 and 2013 despite its awareness of the Plan and the Parcel A  
13 Transfer Fee provision therein. Plaintiff sued Shotgun Investments Nevada (erroneously named  
14 as "Shotgun Nevada Investments, LLC"), Shotgun Creek Las Vegas, LLC, Shotgun Creek  
15 Investments, LLC (collectively, "the Shotgun Entities"), and Wayne M. Perry for intentional  
16 interference with contractual relations, intentional interference with prospective economic  
17 advantage, and unjust enrichment. The defendants removed and moved for summary judgment,  
18 arguing that the preclusion of certain issues decided in the First Action controlled the Second  
19 Action. The Court granted that motion as a motion to dismiss, with leave to amend.

20 Gonzales amended, and the defendants moved for summary judgment. The Court struck  
21 conspiracy and declaratory judgment claims, because Gonzales had no leave to add them. The  
22 Court otherwise denied the motion but noted that the intentional interference with prospective  
23 economic advantage claim was legally insufficient. The defendants moved for summary  
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1 judgment after further discovery. The Court denied the motion and a motion to reconsider but  
2 granted a motion to strike the untimely jury demand. The sole claim remaining for the bench  
3 trial was for intentional interference with contractual relations. The parties settled during trial.

4 **D. The Third (Present) Action**

5 In the present case, No. 2:15-cv-915, Gonzales sued the Desert Entities; SkyVue Las  
6 Vegas, LLC, Howard Bulloch, and David Gaffin in this Court for breach of contract, breach of  
7 the covenant of good faith and fair dealing, and conspiracy. The Court solicited summary  
8 judgment motions on contractual interpretation issues and ruled that: (1) Defendants were  
9 entitled to summary judgment against all claims except the claim for breach of contract; (2)  
10 Plaintiff was entitled to summary judgment on liability for breach of contract; and (3)  
11 Defendants were entitled to summary judgment on the issue of money damages. The Court  
12 ordered briefing on equitable remedies. After considering the various suggestions, the Court  
13 ruled that in the event of a sale, transfer, or other conveyance of Parcel A (or any part of it), the  
14 proceeds were to be applied as follows: first, to pay the first \$25 million in principal secured by  
15 Parcel A (or any part of it, and only to the extent the relevant obligation was incurred before the  
16 date of breach) plus interest accruing on any such principal until the date of breach; second, to  
17 pay the \$10 million Parcel A Transfer Fee plus interest accruing from the date of breach; and  
18 third, to pay any remaining encumbrances in accordance with law and contract. The Court  
19 ordered Plaintiff to submit a proposed judgment, and he has done so. Defendants have objected  
20 to the proposed form of judgment, and the Shotgun Entities have moved to intervene.

21 **II. DISCUSSION**

22 The proposed judgment reads in relevant part:

23 In the event of a sale, transfer or conveyance of Parcel A (or any part of it),  
24 the proceeds are to be applied as follows: first, to pay to the person/entity entitled

1 [to] the first \$25 million in principal secured by Parcel A (or any part of it, and only  
2 to the extent the relevant obligation was incurred before the date of breach of June  
3 11, 2012) plus interest accruing on any such principal until the date of breach of  
4 June 11, 2012; second, to pay to Tom Gonzales the \$10 million Parcel A Transfer  
5 Fee plus interest accruing from the date of breach of June 11, 2012[]; and third, to  
6 pay any remaining encumbrances in accordance with law and contract.

7 (Proposed J. 2:20-3:2, ECF No. 20). The proposed judgment is materially identical to the  
8 Court's instructions, except that it specifies the date of breach. The Court has not yet entered  
9 judgment. The Desert Entities have asked the Court to reconsider. They argue that the  
10 subordination of that amount of their liens exceeding the Parcel A Permitted Financing (\$25  
11 million) to the Parcel A Transfer Fee is inconsistent with the Court's previous rulings that: (1)  
12 the Parcel A Transfer Fee is not yet due; and (2) the Parcel A Transfer Fee does not give rise to  
13 an equitable lien against Parcel A.

14 Although the Court does not agree with most of the Desert Entities' reasoning, it does  
15 believe it must reconsider the remedy. First, it is true that the Parcel A Transfer Fee is not yet  
16 due under the Confirmation Order, because no Parcel A Transfer has occurred, and although a  
17 Parcel A Equity Transfer has occurred, it did not result in any Net Proceeds. The Court  
18 disagrees that subordination of excess liens to the Parcel A Transfer Fee would imply that the  
19 Parcel A Transfer Fee is immediately due, however. A readjustment of priority would simply  
20 mean that in the case of a foreclosure (whether by the Shotgun Entities, by Gonzales after the  
21 Parcel A Transfer Fee later became due, or by some other entity), Gonzales would receive the  
22 Parcel A Transfer Fee after the first \$25 million of liens against Parcel A were satisfied but  
23 before the remainder were. Second, it is true that the Parcel A Transfer Fee does not give rise to  
24 an equitable lien against Parcel A. The Court has so ruled, and the Court of Appeals has  
affirmed. The law of the case would therefore probably prevent the Court from reversing itself  
on that point even if the Court had changed its opinion, which it hasn't. The readjustment of

1 priorities, however, would create no immediate lien against Parcel A by virtue of the Parcel A  
2 Transfer Fee's readjusted priority—the Court's suggested remedy created a mere payment  
3 priority, not an enforceable lien—so such a ruling would not necessarily contradict the law of the  
4 case that there is no lien against Parcel A by virtue of the Parcel A Transfer Fee.

5       Still, the resubordination of the portion of the Shotgun Entities' lien against Parcel A that  
6 exceeds the Parcel A Permitted Financing—even if only in the form of a payment priority that  
7 does not permit Gonzales to foreclose—may be forbidden given the Court of Appeals'  
8 affirmation of the Bankruptcy Appellate Panel's ruling that the Bankruptcy Court erred when it  
9 subordinated (via the Confirmation Order) the Parcel A Transfer Fee to \$45 million of financing  
10 without any agreement by the parties. *In re Desert Land, LLC*, No. 03-1255 (B.A.P. 9th Cir.  
11 Mar. 31, 2004). The Bankruptcy Appellate Panel noted that there was a reference in the record  
12 “to subordination of the Parcel ‘A’ Transfer Fee for up to \$25 million,” but that Gonzales had not  
13 actually agreed to subordinate the Parcel A Transfer Fee to any extent. The issue presented now  
14 is slightly different. The parties do not reargue whether the Parcel A Transfer Fee is subordinate  
15 to any financing, but whether, conversely, the Court may resubordinate some portion of the  
16 Shotgun Entities' liens against Parcel A to the Parcel A Transfer Fee. The Court of Appeals'  
17 previous opinion was issued in the context of a dispute over the Bankruptcy Court's power to  
18 include a term in the Confirmation Order that the parties had not agreed to: the subordination of  
19 the Parcel A Transfer Fee to some amount of financing. Similarly here, the parties have never  
20 agreed to subordinate any portion of liens against Parcel A to the Parcel A Transfer Fee. That is  
21 not the end of the matter, however, because the subordination proposed here would not be via an  
22 amendment to the Confirmation Order in the absence of an agreement by the parties—something  
23 the law of the case (and probably the law generally) prohibits—but rather via a civil judgment on  
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1 a legal claim of breach of contract. In other words, the Desert Entities' lack of agreement to  
2 subordinate their loans to the Parcel A Transfer Fee as a matter of federal bankruptcy law does  
3 not necessarily limit the available remedies for their breach of the Plan under Nevada law.

4 Nevertheless, the Court believes resubordination of the Shotgun Entities' liens to the  
5 Parcel A Transfer Fee is not permitted under Nevada law. Nevada law provides for the  
6 registration of civil judgments, e.g., for breach of contract, which can then be executed under  
7 Chapter 21 of the Nevada Revised Statutes. The Court finds it would be an error of state law to  
8 impose a remedy for breach of contract that would essentially permit a judgment creditor to  
9 advance his lien priority as against third parties beyond what would normally be permitted under  
10 Chapter 21.

11 The Court agrees that if it were to resubordinate some portion of liens against Parcel A to  
12 the Parcel A Transfer Fee, it would probably have to permit affected creditors to intervene,  
13 despite other factors counseling against intervention.<sup>1</sup> Movants argue the resubordination of  
14 their liens against Parcel A will negatively affect their interests. They claim to hold defaulted  
15 liens against Parcel A securing over \$60 million. The subordination of the portion of their liens  
16 in excess of \$25 million to Plaintiff's Parcel A Transfer Fee could harm their interests if they  
17 were to follow through with foreclosure and Parcel A sold for less than approximately \$70

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20 1 The motion to intervene could certainly have been more timely. Movants have been parties to  
21 the Second Action since 2013, the present action has been pending since 2015, and Movants  
22 have long known their interests in their liens against Parcel A were implicated. Also, the Desert  
23 Entities have well represented Movants' interests, forcefully defending the case even against  
24 Plaintiff's proposed equitable relief, where the only beneficiaries of the opposition were  
Movants. Furthermore, the Desert Entities and Movants were represented by the very same  
counsel (Mr. Schwartzer) until four months after the bench trial and three weeks after Movants  
filed the notice of default against Parcel A. Mr. Schwartzer was still counsel for Movants in the  
Second Action during the litigation of the motions for equitable remedies in the present Third  
Action.

1 million. That seems unlikely based on Greg Perry's (a principal of the Shotgun Entities) own  
2 deposition testimony, but the possibility would normally counsel in favor of permitting  
3 intervention so that Movants could at least argue the issue. The Court will not permit  
4 intervention, however. Because the Court will reconsider the remedy and not resubordinate  
5 Movants' liens against Parcel A, Movants can claim no threat to their interests.

6 The Court finds that it must award damages for the breach it has found. Although the  
7 Court previously ruled that no damages had yet been incurred due to the breach of the Parcel A  
8 Permitted Financing provision, the Court now reconsiders.

9 Contract damages serve to protect one or more of three interests of a promisee:  
10 expectation interests (putting the aggrieved party in the position he would be in had the  
11 breaching party fulfilled his duties under the contract, i.e., granting the aggrieved party the  
12 "benefit of the bargain"), reliance interests (putting the aggrieved party in the position he would  
13 be in had he never entered into the contract), and restitution interests (restoring to the aggrieved  
14 party whatever unrequited benefit he has conferred upon the breaching party). Restatement  
15 (Second) of Contracts § 344(a)–(c) (1981); *see also Dynalectric Co. of Nev., Inc. v. Clark &*  
16 *Sullivan Constructors, Inc.*, 255 P.3d 286, 289 & nn.4–6 (Nev. 2011) (citing *id.* and adopting the  
17 approach of the Restatement). An expectation measure of damages is appropriate here,<sup>2</sup> and  
18 Plaintiff has suffered damages due to the breach of the Parcel A Permitted Financing provision.  
19 The Court previously erred in finding otherwise. Under the Confirmation Order, Plaintiff  
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21 2 This is the "ordinar[y]" measure of damages. Restatement (Second) of Contracts § 344 cmt. a.  
22 A reliance measure of damages would be inappropriate here, and perhaps practically impossible  
23 to effectuate, because the Confirmation Order cannot now be unwound, which would be required  
24 to restore Gonzales to his previous position. A restitution measure of damages would also be  
inappropriate, because this case does not involve an unjust-enrichment-type situation where  
Plaintiff has provided services or property and is simply awaiting payment.

1 reasonably expected to be paid the Parcel A Transfer Fee before Parcel A was encumbered  
2 beyond \$25 million. Movants' own actions in beginning foreclosure proceedings against Parcel  
3 A and their current claim that Parcel A is over-encumbered (contrary to Greg Perry's previous  
4 testimony) strengthens the Court's reconsidered finding that Gonzales has already incurred  
5 damages. The Court will therefore enter a money judgment in Plaintiff's favor. Plaintiff may  
6 then, if he wishes, register that judgment as a lien against any property of Defendants so subject  
7 under state law, and state law will govern the priority of such a lien. Defendants also argue that  
8 the Court should not award interest from the date of breach, but this argument is now moot given  
9 the Court's reconsideration of the remedy.

10 **CONCLUSION**

11 IT IS HEREBY ORDERED that the Motion to Intervene (ECF No. 23) is DENIED.

12 IT IS FURTHER ORDERED that the Motion to Reconsider (ECF No. 25) and the  
13 Motion to Reconsider (ECF No. 190 in Case No. 2:13-cv-931) are GRANTED IN PART and  
14 DENIED IN PART. The loans will not be resubordinated, nor will any lien in Plaintiff's favor  
15 be hereby established, but the Court will enter a money judgment in Plaintiff's favor.

16 IT IS FURTHER ORDERED that the Clerk shall enter a copy of this Order into the  
17 docket of Case No. 2:13-cv-931.

18 IT IS FURTHER ORDERED that Plaintiff shall SUBMIT a new proposed judgment  
19 consistent with this Order within fourteen (14) days.

20 IT IS SO ORDERED.

21 Dated this 27<sup>th</sup> DAY OF MARCH, 2018.

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23 ROBERT C. JONES  
24 United States District Judges